Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-521

In The

Supreme Court of the United States

October Term, 1987

—o—

JAMES G. LEDBETTER, PH.D., *et al.*,

Petitioners,

v.

KATHY JO TAYLOR,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the denial of a motion to dismiss the complaint, where the questions raised by the petition are heavily dependent upon the facts.

2. Whether this Court should grant certiorari to review disputed issues of state law.

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STATEMENT OF THE CASE

According to the allegations in the complaint, which must be accepted as true on a motion to dismiss, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 46 (1957), respondent Kathy Jo Taylor, a seven year old child, lies in an irreversible coma in a Georgia hospital because her state-chosen, licensed and supervised foster parents beat her mercilessly five years ago. The state foster case officials who are the petitioners herein placed Kathy Jo in that foster home after they had removed her from her home because of parental neglect.

Kathy Jo, through her guardian, brought a federal civil rights action against the state foster care officials, claiming that they were "deliberately indifferent" to their nondiscretionary duties and her welfare. Complaint ¶¶ 12, 13, 22-25. The District Court granted the foster care officials' motion to dismiss, a decision affirmed by a panel of the Eleventh Circuit. The *en banc* Eleventh Circuit, reversed, denying the motion to dismiss, and remanded for trial. *Taylor v. Ledbetter*, 818 F.2d 791, 800 (11th Cir. 1987).

Based on well-established precedents of this Court, the Eleventh Circuit held that the complaint pleaded that the petitioners violated Kathy Jo's constitutional rights. The Constitutional right at stake was Kathy Jo's right to be protected by her state custodians from "the infliction of unnecessary pain," *Id.* at 794, a right guaranteed by the Fourteenth Amendment to the United States Constitution, *Id.* at 794, and the statutes and regulations of the state of Georgia. *Id.* at 798-799. Kathy Jo stated a claim on which relief could be granted because she adequately pleaded that the state foster care officials were

"deliberately indifferent" to their ward and "departed from accepted professional judgment" resulting in her functional death.

In their petition to this Court, the State foster care officials apparently concede that if Kathy Jo can prove at trial that they were "deliberately indifferent" or "departed from accepted professional judgment" with respect to her, (P.iii, 9),[1] they can be held liable to her. It is thus surprising that they petition this Court to review the Eleventh Circuit's decision. Instead of challenging the court's holding, petitioners challenge the facts alleged in the complaint.

The facts they allege in the petition for certiorari, which petitioners seek this Court to accept, differ markedly from those relied on by the Eleventh Circuit and alleged in the complaint. Additionally, petitioner's constructions of the statutes and regulations of the state of Georgia, and the obligations which they impose upon foster care officials with regard to foster children, differ significantly from those found by the Eleventh Circuit. These differences demonstrate that this case is simply not ripe for review by this Court.

The major area of disagreement to be resolved by the trial court is the nature of the Georgia foster care system and the legal obligations of state and county officials within that system. According to petitioners, state foster care officials' state-imposed obligations to children in foster care are limited to placing these children in foster homes. Thereafter, the foster parents take over the responsibility for the children's care (P. 6). Supervision of foster chil-

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[1]In this brief, "P." denotes the petition for certiorari, and "P. App." denotes the appendix to the petition for certiorari.

dren in foster homes is allegedly provided "by the community" (P. 8), apparently through community members' observation of those children as the children live in the foster homes, attend church and school and play with neighborhood children. (P. 8)

Petitioners' saccharine description of foster care in Georgia (P. 8) contrasts significantly with the foster care system described by this Court in *Smith v. Organization of Foster Families,* 431 U.S. 816 (1977), and the facts in the complaint, upon which the Eleventh Circuit based its decision. Contrary to petitioners' assertions, the Eleventh Circuit found that Kathy Jo, like other children in foster care, is a helpless ward of the state, entitled to protection by those who have decided she needs their care. *Taylor v. Ledbetter,* 818 F.2d 791, 797 (11th Cir. 1987). Foster care officials must, as a matter of state law, "take affirmative actions to ensure the well being . . . of the children in foster care." *Id.* at 799.

To the extent that the petitioners disagreed with the allegations of the complaint, and the findings of the Eleventh Circuit, the Eleventh Circuit ruled that they had the right to present affirmative defenses. *Id.* at 800 n.10. Instead they have petitioned this Court for certiorari. This brief is written in opposition to that petition.

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ARGUMENT

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO AN INTERLOCUTORY DENIAL OF A MOTION TO DISMISS THE COMPLAINT.

Petitioners seek review of an Eleventh Circuit decision which denied the state foster care officials' motion

to dismiss and remanded Kathy Jo's civil rights damage action for a trial on the merits, *Taylor v. Ledbetter,* 818 F.2d 791, 800 (11th Cir. 1987), i.e., a non-final order. This Court is reluctant to grant certiorari in cases, such as the instant one, where decisions are not final, *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 689 n.30 (1979); or where courts have remanded, because they are "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,* 389 U.S. 327, 328 (1967).

The reason for this reluctance is that these cases do not come with a full factual record. An incomplete factual record makes the task of deciding important issues of law extremely difficult, if not impossible. *Commonwealth of Massachusetts v. Painten,* 389 U.S. 560, 561 (1968); *See also, National Labor Relations Board v. Sears, Roebuck & Co.,* 421 U.S. 132, 164-165 (1975). *E. I. Du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 135 n.26 (1977); *Tennessee v. Garner,* — U.S. —, —, 105 S.Ct. 1694, 1707 (1985).

This case has *no* factual record whatsoever, let alone an incomplete one. If this Court reviews this action now, it must accept all facts pleaded as true, and construe all allegations favorably to Kathy Jo. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley v. Gibson,* 355 U.S. 41, 45-48 (1957).

Petitioners, however, do not accept as true the facts pleaded in the complaint. Rather, they contest virtually every fact alleged, except for the fact that Kathy Jo lies in an irreversible coma, due to injuries inflicted by her foster parents, while she was entrusted to petitioners' care.

The District Court, not this Court, is the proper forum to resolve factual issues. *Branti v. Finkel,* 445 U.S. 507, 512 n.6 (1980); *Parham v. J.R.,* 442 U.S. 584, 620 (1979); *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 506 (1969). Without adjudicated facts, petitioners seek a premature advisory opinion on abstract, hypothetical questions, inappropriate for this court to answer. *Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 284 (1969). Indeed, upon remand, the resolution of the factual issues may resolve the legal issues as well. *See, e.g., Belcher v. Stengel,* 429 U.S. 118 (1976).

Furthermore, premature adjudication is particularly inappropriate in this case because the issues upon which petitioners base their request for review—causation and the standard of liability in civil rights damage actions—are particularly fact-sensitive. Finally, the governing law to guide the finder of fact is well-settled, and was properly articulated by the Court of Appeals for the Eleventh Circuit.

A. The Court of Appeals Properly Stated the Legal Standard for Causation in a Civil Rights Action.

The foster care officials' first claim for review is that Kathy Jo was put into a coma by "the independent act of her foster mother for which they are not legally responsible." (P. 5) This contention directly contradicts the allegations in the complaint that the act was not independent and that foster care officials' actions and failures to act caused Kathy Jo to lose her constitutional rights. The foster care officials' "independent contractor" claim is an affirmative defense to the complaint which they will have the opportunity to try to prove at trial.

The foster care officials, furthermore, misconstrue the issues they themselves raise. Contrary to their claim that the question is *state action* (P. 5), the issue really is *causation,* i.e., whether they may be held legally responsible for injuries which they did not personally inflict. *That* issue has already been resolved against the foster care officials.

42 U.S.C. § 1983, the civil rights statute, explicitly imposes liability upon those who "cause to be subjected" as well as those who subject individuals to the deprivation of federal rights. Following the plain language of that statute, this Court has repeatedly held that governmental bodies and officials may be held legally responsible for the violations of constitutional rights even when they do not personally inflict injury upon the victims. *Pembauer v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986); *Youngberg v. Romeo,* 457 U.S. 307, 312 (1982); *Owen v. City of Independence, Missouri,* 445 U.S. 622 (1980); *City of Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981); *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

A government official can be liable for injuries inflicted by others if he fails to discharge an affirmative duty and his failure is a substantial factor in the violation of a constitutionally protected right, *Rizzo v. Goode,* 423 U.S. 362 (1976). "[W]here action is directed by those who establish governmental policy, the [government] is responsible . . . " *Pembauer v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292, 1299 (1986). The court below so ruled. *Taylor v. Ledbetter,* 818 F.2d 791, 794 (11th Cir. 1987).

Even where the government officials have not explicitly ordered subordinates to inflict injury, they may still be held responsible for their actions or omissions if there is "a direct causal connection between municipal conduct and the constitutional deprivation." *City of Springfield, Massachusetts v. Kibbe,* — U.S. —, —, 107 S.Ct. 1114, 1120 (1987) (O'Connor, J., dissenting from dismissal of the writ of certiorari). The Eleventh Circuit recognized that Kathy Jo alleged that causal connection in her complaint. *Taylor v. Ledbetter,* 818 F.2d 791, 796 n.6 (11th Cir. 1987).

Whether government action causes injury to civil rights is a determination for the finder of fact. "A jury may be permitted to find that a defendant's reckless misconduct bears a sufficient causal relation to a plaintiff's harm to make him liable . . . " Restatement (Second) of Torts § 501, Comment a, p.591 (1965), quoted in *City of Springfield, Massachusetts v. Kibbe,* — U.S. —, —, 107 S.Ct. 1114, 1121 (1987) (O'Connor, J., dissenting from dismissal of the writ of certiorari). Where causation is properly alleged, this Court reviews the sufficiency of the evidence thereof only after proof and determination at trial. *City of Springfield, Massachusetts v. Kibbe,* — U.S. —, 107 S.Ct. 1114 (1987); *Pembauer v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986); *City of Oklahoma City v. Tuttle,* 471 U.S. 801 (1985); *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978). *See, e.g. Tennessee v. Garner,* — U.S. —, —, 105 S.Ct. 1694, 1707 (1985) (remanded to determine the policy of the Police Department); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

The complaint alleges, and it is uncontroverted, that the foster care officials were Kathy Jo's legal custodians (P. 5). They thus had a duty under the Constitution to protect her from harm. *Youngberg v. Romeo,* 457 U.S. 307 (1982). The complaint alleges they were deliberately indifferent to their duty to their ward (Complaint ¶¶ 13, 20,21), and carried out their obligations in an unprofessional manner. *Youngberg v. Romeo,* 457 U.S. 307, 323 (1982). The state foster care officials placed Kathy Jo in the home of her assailants. Their deliberate indifference and significant departure from accepted professional standards caused the deprivation of Kathy Jo's constitutional rights, i.e., the beatings and other severe abuse (Complaint ¶ 28), which have caused her to go into a coma from which she will never awaken (Complaint ¶ 29). They lacked actual knowledge of Kathy Jo's beatings only because they chose to avoid it.

Not only does the standard enunciated by the Eleventh Circuit conform to the decisions of this Court, it is also consonant with the decisions of all other circuits which have faced the issue. *Estate of Bailey v. County of York,* 768 F.2d 503 (3rd Cir. 1985); *Fox v. Custis,* 712 F.2d 84 (4th Cir. 1983); *Doe v. New York City Department of Social Services,* 649 F.2d 134 (2d Cir. 1981), subsequent appeal 709 F.2d 782 (2d Cir.) *cert. denied sub nom. Catholic Home Bureau v. Doe,* 464 U.S. 864 (1983). Given the lack of disagreement among the circuits as to the legal standard, this case is inappropriate for certiorari.

Contrary to petitioners' assertions, this case is not similar to *Martinez v. California,* 444 U.S. 277 (1980), where the government officials owed no special duty to

the plaintiff, *Id.* at 285, and had no control over or responsibility for the actions of the person who killed the plaintiff, *Id.* at 285. The officials were Kathy Jo's legal custodians, entrusted with her care and with the specific obligation to protect her constitutional right to be free from harm. Moreover, they chose, controlled and had ongoing supervisory responsibility over the foster parents who beat Kathy Jo into a living death. The foster care officials were required to investigate the foster parents, O.C.R.R.G. § 290-21-12-.08(13) (P. App. 141); O.C.G.A. § 49-5-12(e) (P. App. 134); pay them to carry out their obligations to provide day-to-day care for Kathy Jo, O.C.G.A. § 49-5-8(a)(2)(E) (P. App. 127), O.C.R.R.G. § 290-2-12-.08 (15) (P. App. 143); and "fully regulate" them. *Ramos v. Montgomery,* 313 F.Supp. 1179, 1183 (S.D. Cal. 1970); *aff'd* 400 U.S. 1003 (1971).

This case is controlled by *Youngberg v. Romeo,* 457 U.S. 307 (1982), wherein this Court held that state custodians had an obligation to protect institutionalized retarded persons from being harmed by other residents of the institution or by themselves; and by *Scheuer v. Rhodes,* 416 U.S. 232 (1974), where this Court held that the governor of a state could be held liable for violations of civil rights if he acted "in an arbitrary manner, grossly abusing the lawful powers of office," *Id.* at 235. Kathy Jo Taylor, having properly alleged causation, is entitled to a trial to prove it.

B. The Court of Appeals Properly Stated the Standard of Liability.

The foster case officials' second and third claims for review purportedly invoke the standard of liability for

damages in civil rights actions. In fact, they once again simply seek to avoid a trial by raising unproven affirmative defenses to the complaint, inappropriately raised on a petition for certiorari.

First, the foster care officials describe a foster care system markedly different from that alleged in the complaint. According to them, "the world of foster children is similar to that of the school children in *Ingraham*, where 'openness' and 'supervision by the community afford significant safeguards against . . . abuses. . . .'" (P. 8) The complaint and the Eleventh Circuit's decision, in contrast found that "[c]hildren in foster homes are . . . isolated . . . helpless . . . and at the mercy of the foster parents" unless the foster care officials provide the "investigation, supervision, and constant contact required by statute." *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987). Moreover, the notion that Kathy Jo Taylor "shares in . . . activities as if [s]he were [the foster parents'] own child" (P. 8) is simply bizarre, given that her purportedly benevolent foster parents—selected and supervised by the foster care officials—repeatedly and wantonly struck, shook, threw down, beat, and abused her so brutally that she lapsed into a permanent coma. (Complaint ¶ 28). Which description of the foster care system, the foster care officials' or the Eleventh Circuit's, is more accurate, should be resolved at trial, not on motion to dismiss.

Next, the foster care officials assert that Kathy Jo has not alleged "*facts* that indicate knowledge of potential harm to the person injured, causal connection between alleged omissions to act and resultant injuries, or deviation from accepted social work standards." (P. 13) Kathy

Jo has alleged that the foster care officials were deliberately indifferent to their non-discretionary duties to investigate and supervise the foster parents. She has further alleged that if petitioners had investigated in a professional manner, they would have learned that the foster parents were unfit and a danger to children. (Complaint ¶ 28). To ask her to allege more is an unreasonable pleading burden on a child in an irreversible coma who cannot communicate with counsel, and is unsupported by any precedent of this Court or rule of pleading. The foster care officials are in complete control of the documentation surrounding Kathy Jo's foster care placement and their standards and practices. Absent discovery, the foster care officials will never have to explain what happened to Kathy Jo. Their request for "more facts" in Kathy Jo's complaint is, in effect, a transparently disguised assertion of absolute immunity.

The foster care officials' analysis of the standard of liability in this civil rights action is contrary to well-settled law. First, they begin their attack on the Eleventh Circuit from the wrong starting point. The foster care officials claim that the Eleventh Circuit wrongly applied the Eighth Amendment to children in foster care. (P. 7-8) It did not. Instead, the Eleventh Circuit based its analysis on the deliberate indifference standard of liability, which this Court applied in civil rights damage actions brought by prisoners. The Eleventh Circuit found that the same standard should apply in civil rights actions brought by foster children, whose right to be free from harm is guaranteed by the Fourteenth Amendment, reasoning that "defenseless children [in foster care who suffer] gross mistreatment and abuse . . . [are entitled to] at least the same

protection afforded adults who are imprisoned as a result of their own misdeeds." *Taylor v. Ledbetter,* 818 F.2d 791, 797 (11th Cir. 1987). This Court used the same analysis in *Youngberg v. Romeo,* 457 U.S. 307 (1982), wherein it ruled, also under the Fourteenth Amendment, that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-322.

The general principle evident in the Eleventh Circuit decision, and this Court's precedents, is that since innocent people involuntarily confined for beneficient rather than punitive purposes are entitled to more considerate treatment from their governmental custodians, the standard of liability in civil rights damages actions is lower for innocent institutionalized persons than for prisoners. This Court so recognized in *Youngberg, supra,* holding that although prisoners had to show deliberate indifference in order to recover damages under 42 U.S.C. § 1983, involuntarily committed mental patients had to prove only a substantial departure from accepted professional judgment, a lower standard of liability, having no state of mind requirement. Therefore, the Eleventh Circuit would have been fully justified in holding that Kathy Jo had to plead only "departure from accepted professional practice," not "deliberate indifference" to state a claim. If there was error in the Eleventh Circuit's articulation of the applicable pleading standard, it inured to the benefit of the foster care officials, not to their detriment.

The foster care officials apparently recognize that the deliberate indifference standard of Eighth Amendment

civil rights cases benefits them. After renouncing that standard in Point II of their petition, they adopt it in Point III (P. 9-13). Kathy Jo pleaded deliberate indifference and agrees that that standard of liability is appropriate. The complaint also implicitly alleges the "substantial departure from accepted professional practice" standard in that it alleges failure to supervise and investigate, which are the touchstones of accepted professional practice. The foster care officials acknowledge that this standard too is appropriate to measure their liability for Kathy Jo's injuries (P. 9).

Any higher pleading standard would require actual knowledge, which this Court has never required. On the contrary, the most stringent standard of liability which any member of this Court has held to apply has been a standard of government officials' "deliberate indifference to citizens' constitutional rights" or "reckless disregard for the consequences" of their actions. *City of Springfield, Massachusetts v. Kibbe,* — U.S. —, —, 107 S.Ct. 1114, 1121 (1987) (O'Connor, J., dissenting from the dismissal of the writ of certiorari).

In the absence of a factual record demonstrating that this case does indeed raise questions as to the standard of liability in a civil rights damage action, the foster care officials' request for review is, in effect, a request for an abstract, advisory opinion. The foster care officials, by phrasing their request for review in the broadest possible terms, are clearly seeking just such an opinion. "[S]tate officials in the Eleventh Circuit and perhaps throughout the country . . . need to know the parameters of [their] liability" for "injuries to *all* children in their legal custody, even those not in their physical possession . . ."

(P. 12) (emphasis added). Answering such a broad constitutional question requires careful balancing of those interests upon which standards of liability are grounded. For that reason, this Court has dealt with the standard of liability issue in cases presenting a full factual record. *See, e.g., Pembauer v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, — U.S. —, 105 S.Ct. 2427 (1985); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *Smith v. Wade*, 461 U.S. 30 (1983). In the complete absence of a factual record, this abstract, hypothetical question is not appropriate for this Court. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969).

II. THIS COURT SHOULD NOT REVIEW A DISPUTED QUESTION OF STATE LAW.

The foster care officials base their final claim for review on the argument that Kathy Jo has not stated a claim for relief based upon their violation of her state-created liberty interest. They contend that: (a) under state foster care law their obligations are minimal (P. 14) and their discretion unfettered (P. 15); (b) the Eleventh Circuit decision will open the floodgates so that every violation of state law becomes a civil rights violation (P. 4); and (c) the Eleventh Circuit decision will require hearings on all decisions in the lives of foster children, such as moving a foster child from one home to another (P. 16). The foster care officials' contentions misunderstand the Eleventh Circuit's decision, Kathy Jo's legal claims, and their obligations under Georgia law. Most importantly, however, construction of the foster care officials' state law obligations is a task for the District Court in the first instance, not this Court.

The foster care officials acknowledge that Kathy Jo's complaint does not allege procedural due process violations (P. 16). They seem oblivious to their own acknowledgment and petition this Court for certiorari as if Kathy Jo had made such a claim.

The foster care officials simply misunderstand the Eleventh Circuit's reliance on *Board of Regents v. Roth*, 408 U.S. 564 (1974). See *Taylor v. Ledbetter*, 818 F.2d 791, 798-800 (11th Cir. 1987). While *Roth* dealt with procedural due process, the Eleventh Circuit recognized its broader significance to this case—that state statutes and regulations may create interests protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 798. This Court, as well, has ruled that state statutes and regulations may create liberty interests. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983); *Mills v. Rogers*, 457 U.S. 291, 300 (1982). These constitutionally-protected liberty interests may be more extensive than those created by the United States Constitution, *Mills v. Rogers*, 457 U.S. 291, 300 (1982); and they are entitled to substantive as well as procedural protection. *Id.* at 298-299.

The Eleventh Circuit properly determined that Kathy Jo stated a claim that Georgia's foster care statutes and regulations created a liberty interest of foster children in being protected by their governmental custodians from physical harm. *Taylor v. Ledbetter*, 818 F.2d 791, 798-800 (11th Cir. 1987). As the foster care officials concede, and as their appendix demonstrates, the Georgia statutes and regulations governing foster care of children are lengthy and pervasive. They regulate a "complex" foster care system consisting of "a net work of governmental and private caretakers." (P. 11) The Eleventh Circuit carefully evaluated all the statutes and regulations and found they

commanded "comprehensive and direct" action and were not mere "procedural guidelines." *Taylor, supra,* at 799.

The Eleventh Circuit found that the plain language of the Georgia statutes requires government foster care officials to evaluate each prospective foster parent as to eight specific criteria. O.C.R.R.G. § 290-2-12-.08(13) (P. App. 41). Similar plain language requires that agency employees supervise children in foster home at least once a month, and more if necessary. O.C.R.R.G. § 28-90-2-12-.08(16) (P. App. 42). Georgia statutes mandate that agencies keep health records, including medical histories, on each foster child. O.C.R.R.G. § 290-2-12-.08(19) (P. App. 144). These mandatory duties create a liberty interest, and enable foster children to state a claim for deprivation of that interest "when the officials fail to follow this mandate." *Taylor, supra,* at 799. *See Hewitt v. Helms,* 459 U.S. 460, 472 (1983).

In arguing the Eleventh Circuit misinterpreted Georgia's complicated foster care law, (P. 14, 15), the foster care officials forget that this Court "d[oes] not grant certiorari to decide whether the Court of Appeals correctly applied [state] law." *Butner v. United States,* 440 U.S. 48, 51 (1979); see also *Pierson v. Ray,* 386 U.S. 547, 558 n. 12 (1967). Instead, this Court generally "accord[s] great deference to the interpretation and application of state law by the courts of appeals," *Pembauer v. City of Cincinnati,* — U.S. —, —, 106 S.Ct. 1292, 1301 (1986), because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500 (1985); see also *Chadron v. Fumero Soto,* 462 U.S. 650, 654 n.5 (1983); *Bishop v. Wood,* 426 U.S. 341, 346 (1976).

It is particularly inappropriate for this Court to review complicated questions of Georgia law when the Eleventh Circuit did not finally decide those questions. That court simply found that Kathy Jo sufficiently alleged a violation of a state-created liberty interest. It remanded to the District Court to determine the extent of that interest by determining the "scope of authority and the extent of duties of the [petitioners]." *Taylor, supra,* at 800 n.10. Upon remand to the District Court, the foster care officials will have the opportunity to raise as a defense to respondent's claims, and to support with evidence, the state statutory construction arguments which they seek to raise in this Court.

Finally, this Court should not grant certiorari to decide a complex issue of state law because the foster care officials' construction of that law are self-serving and illogical. Petitioners allege that they have no state-imposed duties to foster children other than to place the children in foster homes, where the foster parents will supervise them. "[T]he only action taken by any of the state officials sued was the decision to place Respondent for care in the home of her foster parents, Mr. and Mrs. Lathren" (P. 6). Petitioners claim that state law does not require them to investigate (P. 15) or license (P. 14) prospective foster parents. After they place children in foster homes, they are allegedly not required to inspect (P. 14) or supervise (P. 15) the homes.

The notion that Georgia has no state-imposed duties to its infant wards has already been squarely refuted by this Court, which found that "a specific [Georgia] statute" requires the state to protect the general welfare of its foster children. *Parham v. J.R.*, 442 U.S. 584, 618 (1979). Moreover, the Supreme Court of Georgia, construing

Georgia foster care law, ruled that: "our children, the pride of every generation and the seed corn of the future, must be protected. The General Assembly has provided how this is to be done." *Sanchez v. Walker County Department of Children and Family Services*, 237 Ga. 406, 229 S.E.2d 66, 70 (1976).

Specifically, the Georgia Department of Human Resources is the legal custodian of the children who have been removed from their homes, with all the responsibilities of a legal custodian. O.C.G.A. §§ 49-5-8(a)(3)(A) (P. App. 28), 49-5-3(12) (P. App. 24), 15-11-34(a)(12), 15-11-43, (Respondent's Appendix); *Taylor v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987).

The foster care officials are responsible for finding people to act as their agents in providing day-to-day care for the Department's wards, i.e., foster parents. O.C.R.R.G. § 290-2-12-.08(2)(a) (P. App. 139-140). In order to carry out their duties as legal custodian, the government officials must make certain that the prospective foster parents will provide good care for the children who have already suffered serious hardships at the hands of their parents. The officials must accomplish this task by conducting supposedly careful investigations of the prospective foster parents, studying: the foster parents' (a) motives; (b) adjustments to each other and to the community; (c) attitudes toward the child's parents and parental visits; (d) expectations of child behavior; (e) physical home standards; (f) community resources, including schools, churches, and recreation, medical and mental health facilities; (g) the mental, physical, and emotional health; (h) training; (i) support networks; and (j) finances. O.C.R.R.G. § 290-2-12-.08(13) (P. App. 141).

Once the government officials have selected foster parents and placed the children in those homes, their obligations do not end. The government, not the foster parents, remains the legal custodian of foster children. *Sanchez v. Walker County Department of Family and Childrens Services*, 237 Ga. 406, 229 S.E.2d 66 (1976). Government officials, not the foster parents, have the final responsibility for ensuring that the foster children receive proper care and for making all significant decisions for the children's well-being.

To carry out these responsibilities, the government officials of the child-placing agency, i.e., the county Department of Children and Family Services, O.C.R.R.G. § 290-2-12-.01(i) (P. App. 140), must supervise foster children carefully. For example, they must make regular visits to the children in the foster homes, at least once a month. O.C.R.R.G. § 290-2-12-.08(16) (P. App. 143). Something obviously went wrong in the way these supervisory responsibilities were fulfilled for Kathy Jo.

The government officials must also make decisions as to the children's major medical treatment, including hospitalization. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 617-620 (1979); complaint ¶ 11, 22. In order to make these decisions within the parameters of accepted professional judgment, the officials must assemble complete medical information on their infant wards. *Parham v. J.R.*, 442 U.S. 584, 618-619 (1979). The government foster care officials failed to fulfill this responsibility to Kathy Jo.

Kathy Jo's complaint thus describes a very different type of foster care system than does the petition for certiorari. The Court of Appeals properly ruled that

Kathy Jo is entitled to a trial to prove her claims. To the extent that petitioners disagree with those allegations, they have the right to present affirmative defenses. They have no right, however, to obtain a dismissal of Kathy Jo's complaint, as it states a valid cause of action.

The foster care officials claim that because the Gwinnett County Department of Family and Children's Services does not have to be licensed by the state, its officials consequently do not have to inspect or license the agency's foster homes (P. 14). It is true that county Departments of Family and Children's Services do not need special licenses from the state in order to provide foster care, O.C.G.A. § 49-5-12(q) (P. App. 37), as they are arms of the state. It does not, however, logically follow that county departments are exempt from the requirements of licensing and inspecting foster homes. Exemption from one form of license does not include exemption from all other statutory requirements.

The foster care officials argument that "there is nothing in the statutes and regulations which indicates that an individual child may not be placed in a foster home without a pre-placement investigation or post-placement supervision" is simply wrong. O.C.R.R.G. §§ 290-2-12-.08(13) and (16) (P. App. 142-143) require foster care officials to license prospective foster parents and supervise all foster homes within their jurisdiction. All child-placement agencies, i.e., all agencies which place children in foster homes, O.C.G.A. § 49-5-3-(2) (P. App. 122), must follow these regulations, and the various county Departments of Family and Children's Services in Georgia are child-placing agencies. *See, e.g., Drummond v. Fulton County Department of Family and Children's Services,*

547 F.2d 835, 858 (5th Cir. 1977) (Roney, J., dissenting), *rev'd* 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied 437 U.S. 910 (1978). Indeed, if the state of Georgia did place children in unlicensed foster homes, it would be in violation of federal as well as state law. 42 U.S.C. § 672(c)(1).

Given (a) the deference to which Court of Appeals constructions of state law are entitled; (b) the fact that the Eleventh Circuit has not finally determined the scope of Georgia's complicated foster care laws; and (c) the lack of support for the foster care officials' contrary construction of those laws, it is inappropriate for this court to grant certiorari to this case.

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CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be denied. Respondent Kathy Jo Taylor should be allowed to prove at trial that she is in an irreversible coma because of the foster care officials' deliberate indifference to her constitutional rights.

DATED: HEMPSTEAD, NEW YORK
OCTOBER, 1987

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APPENDIX

O.C.G.A. § 15-11-34:

(a) If the child is found to be a deprived child, the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:

(1) Permit the child to remain with his parents, guardian, or other custodian, including a putative father, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(2) Subject to conditions and limitations as the court prescribes, transfer temporary legal custody to any of the following:

(A) Any individual including a putative father who, after study by the probation officer or other person or agency designated by the court is found by the court to be qualified to receive and care for the child;

(B) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child;

(C) Any public agency authorized by law to receive and provide care for the child; or

(D) An individual in another state with or without supervision by an appropriate officer under Code Section 15-11-46; or

(3) Without making any of the orders specified in paragraphs (1) and (2) of this subsection, transfer custody of the child to the court of another state exercising jurisdiction over juveniles if authorized by and in accordance with

Code Section 15-11-44 if the child is or is about to become a resident of that state.

(b) unless a child found to be deprived is found also to be delinquent, he shall not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children.

O.C.G.A. § 15-11-43:

A custodian to whom legal custody has been given by the court under this article has the right to physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care, and the right and duty to provide for the care, protection, training, and education and the physical, mental, and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child's parents or guardian.